PACIFIC LEGAL FOUNDATION

July 6, 2020

Public Comments Processing
EPA-HQ-OW-2020-0008
Attn: David P. Ross
Assistant Administrator, Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Via Federal eRulemaking Portal

Re: Pacific Legal Foundation comments supporting EPA's position that the Clean Water Act does not require consultation under the Endangered Species Act before transferring 404 permitting authority to states

Dear Assistant Administrator Ross:

Pacific Legal Foundation submits these comments supporting the Environmental Protection Agency's position that it need not consult the Fish and Wildlife Service under the Endangered Species Act before transferring Section 404 permitting authority to states. In *National Association of Home Builders v. Defenders of Wildlife*, the Supreme Court held that consultation is not required to transfer to states permitting power under the Clean Water Act's section 402. There is no legally relevant distinction between the Section 402 program and the Section 404 program. Under Section 404, Congress has directed that EPA "shall approve" a transfer of authority to a state if it meets eight criteria, none of which are consultation with FWS.

Pacific Legal Foundation

Pacific Legal Foundation is a nonprofit law firm whose attorneys have extensive experience under the CWA. PLF attorneys have been counsel of record in many cases concerning the interaction of the CWA, property rights, federalism, and the separation of powers[1] and have produced substantial scholarship on the ESA.[2] PLF attorneys also often provide their expertise to policy makers through congressional testimony and comment letters.[3]

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[1] *See, e.g.*, *Robertson v. United States*, 139 S. Ct. 1543, 203 L. Ed. 2d 708 (2019); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 623, 199 L. Ed. 2d 501 (2018).

[2] *See, e.g.*, Damien M. Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 Envtl. L. Rep. News & Analysis 10,352 (2017); Jonathan Wood, *Take It To The Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015).

[3] *See, e.g.*, Hearing on the Modernization of the Endangered Species Act before the House Natural Resources Committee (Sept. 26, 2018); Hearing on ESA Consultation Impediments to Economic and Infrastructure Development before the House National Resources Committee, Subcommittee on Oversight and Investigations (Mar. 28, 2017).

Background

Section 404 prohibits the "discharge of dredged or fill material" absent a permit.[4] Controversially, this has been interpreted to prohibit activities affecting wetlands, ephemeral streams, and other disputed areas, with the Supreme Court suggesting that an overly broad interpretation intrudes on the states' primary authority over land use and water regulation.[5]

As a default rule, the permitting process is controlled by federal entities. However, if states have "adequate authority," according to eight criteria, they may administer the permit program.[6] Few states have sought and received such transfer. Although this is mostly because EPA is perceived as not applying the criteria fairly,[7] the potential ESA implications are another concern. A CWA permit does not, on its own, excuse harms to endangered species. Under the ESA, authorization for these impacts must come from FWS.

The State of Florida seeks to take over Section 404 permitting. Concerned about ESA burdens on its residents, Florida has suggested EPA consult with FWS before transferring permitting authority to the Florida Department of Environmental Protection (FDEP). This would, the state believes, be more efficient than having FWS review individual permits later.

I. Consultation Is Not Required to Transfer 404 Permitting Authority to States

In *National Association of Home Builders v. Defenders of Wildlife*, the Supreme Court considered whether the EPA must consult FWS before transferring to states authority to issue 402 permits.[8] Congress directed EPA to "transfer certain permitting powers to state authorities upon an application and a showing that nine specified criteria have been met."[9] At issue in *Home Builders* was whether the ESA implicitly added another criteria: consultation with FWS.

The Supreme Court held that it did not. Applying ESA regulations, the Court determined that consultation is only required for "discretionary" federal actions.[10] The CWA directs EPA to transfer

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4 *See* 33 U.S.C. § 1344.

5 *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

6 33 U.S.C. § 404(h).

7 Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1268–69 (1995) (discussing U.S. Envtl. Protection Agency, *Study of State Assumption of the Section 404 Program* 10 (1992)).

8 *See* 551 U.S. 644, 649 (2007).

9 *Id.*

10 *See* 50 C.F.R. § 402.03.

authority to states if the criteria are met, with no discretion to refuse doing so based on impacts to species.[11]

Experience has shown that Section 402 was no one-off. Since 2007, courts have repeatedly held that consultation is not required where Congress directs an agency to do something under criteria that do not include impacts to species.[12]

Section 404 directs that EPA "shall" transfer permitting authority to states if statutory criteria are met.[13] Under *Home Builders*, consultation is not required unless the criteria include consideration of impacts to species. They do not. Instead, the criteria concern only the state's (1) authority to issue permits meeting CWA standards; (2) procedures to ensure notice, comment, and a hearing; (3) assurances that no permit will substantially impair anchoring or navigation; (4) means of enforcement; and (5) an assurance of continued federal-state collaboration.[14]

The only one of these that could even plausibly include impacts to species is (1) authority to issue permits meeting CWA standards. Although EPA's CWA guidelines address impacts to species,[15] this does not mean that transfer of authority is conditioned on consultation with FWS. As in *Home Builders*, the criteria do not "require scrutiny of the underlying standards or of their effect on marine or wildlife" only the state's "authority . . . [t]o issue permits" consistent with the applicable standards.[16]

If Congress had wished for consultation to be one of the criteria, it would have said so, as it did for other impacts. The CWA requires an "assur[ance] that no permit will be issued" if, after "consultation" with the Coast Guard, anchorage or navigation of any navigable water would be substantially impaired.[17] It would make no sense for Congress to speak in such detail about consultation with the Coast Guard while making consultation with FWS an obscure implication of stray statutory text.

The CWA's deadlines reinforce this conclusion. If EPA fails to complete its evaluation of the transfer criteria within 120 days, the transfer is automatically approved.[18] Adding an additional requirement to consult with FWS would only ensure that EPA rarely meets this deadline, resulting in automatic transfer no matter the ultimate outcome of the consultation.

Instead of requiring consultation under the ESA, the CWA provides FWS a general opportunity "to comment on a state application for assumption of the 404 program."[19] Although EPA must "tak[e] into

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[11] *See Nat'l Ass'n of Home Builders*, 551 U.S. at 671.
[12] *See, e.g., Nat'l Wildlife Fed'n v. Sec. of the Dep't of Trans.*, 960 F.3d 872 (6th Cir. 2020).
[13] 33 U.S.C. § 404(h).
[14] *Id.* § 404 (h)(1).
[15] 40 C.F.R. § 230.10(b)(3)
[16] *Id.* at 671–72 & n.10 (quoting 33 U.S.C. § 1342(b)(1)(A) (alterations in original)).
[17] 33 U.S.C. § 404(h)(1)(F).
[18] *See* CWA Section 404(h)(3).
[19] 33 U.S.C. § 404(h)(1).

account" these comments, this does not convert mandatory transfer into a discretionary decision. If FWS' comments show that a state does not meet the criteria, EPA may deny transfer but not otherwise. Indeed, FWS' comment need not necessarily relate to consultation. One of the CWA's goals is to provide for the "protection and propagation of fish, shellfish, and wildlife[.]"[20] FWS has considerable expertise, data, and authorities related to this goal that could inform a comment. In any event, EPA should not misread FWS' opportunity to comment as an implicit conditioning of transfer on consultation.

II. Applying the Transfer Provision as Written Would Best Advance Federalism Values

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[21] Federalism provides decentralized government "sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry."[22]

In both the CWA and the ESA, Congress recognized the importance of federalism.[23] Land use and local water rights "are traditionally state or local in nature."[24] The Clean Water Act's distinct "pro-federalism thrust"[25] reaches its summit in the state authority to assume permitting responsibility.[26] The simplest way to respect the CWA's "federalism concerns" and "respect[] the state applicants"[27] is to minimize federal interference. Therefore, consistent with the CWA's text, EPA should continue to interpret transfer as nondiscretionary.

III. While Florida's Desire to Reduce ESA Burdens is Admirable, Conditioning Transfer on Consultation Would Not Achieve This Goal

The ESA and CWA individually impose significant burdens on landowners and industry. So, naturally, their combination imposes considerably greater burdens. Recognizing this, Florida proposes that EPA consulting before transferring authority to states would reduce burdens later. Although such

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[20] *Id.* § 1251(a)(2).

[21] *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

[22] *Id.* at 458; *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987).

[23] *See* 33 U.S.C. § 1251(b). *See also* Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal-or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 447, 449 (2018).

[24] *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Marc R. Poirier, *Non-point Source Pollution*, in Envtl L. Practice Guide § 18.13 (2008)).

[25] *Nat. Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 184 (D.C. Cir. 1988).

[26] *See Michigan Peat v. Reg'l Adm'r of Region V of U.S. E.P.A.*, 7 F. Supp. 2d 896, 898 (E.D. Mich. 1998), *aff'd in part, rev'd in part on other grounds sub nom. Michigan Peat, a Div. of Bay-Houston Towing Co. v. U.S. E.P.A.*, 175 F.3d 422 (6th Cir. 1999).

[27] Brief for Petitioner Environmental Protection Agency at 20, *Home Builders*, 127 S. Ct. 2518 (Nos. 06-340, 06-549).

streamlining is an admirable goal, conditioning transfer on consultation would not accomplish it. Indeed, it is more likely to increase regulatory and permitting burdens.

Under *Cottonwood Environmental Law Center v. U.S. Fish and Wildlife Service*,[28] a programmatic consultation, like that Florida requests, is no panacea. Instead of a simple, one-time process, consultation could be interminable. *Cottonwood* requires programmatic consultations to be reinitiated every time there's a regulatory change. Thus, if consultation applies to the transfer authority, EPA would have to consult with FWS every time a new species is listed, critical habitat is designated, or other regulations are changed affecting any listed species within the state. Because of the large number of listed species—Florida is home to 130—this would be no small barrier to the effective transfer of permitting authority.

Applying the ESA to the transfer decision rather than the individual permittee would also change the standard that applies, thereby increasing regulatory burdens overall. States and private parties need permits for any activity that would take a listed species.[29] Although ordinary land use decisions that affect habitat can require a permit, this is only so where such activity "actually kills or injures wildlife."[30] Consultation, in contrast, requires consideration of take or adverse modification of critical habitat.[31] Therefore, requiring consultation as a condition of transferring authority to the states may result in more burdensome restrictions and mitigation measures.

That said, there is much that states, EPA, and FWS can do to reduce unnecessary permitting burdens. States can, for instance, prepare habitat conservation plans for individual species or groups of species that cover actions the state permits, so that individuals can rely on predetermined mitigation measures.[32] Likewise, EPA should work with FWS to develop model permits covering run-of-the-mill projects. EPA already does this under the Clean Water Act through nationwide permits.[33] FWS has no similar set of permits for common activities affecting species. EPA should work with FWS and states to develop simplified permits that satisfy CWA and ESA standards and minimize delays and burdens on landowners.

Conclusion

While PLF appreciates Florida's and EPA's desire to streamline permitting, conditioning transfer of 404 permitting on consultation with FWS is contrary to Supreme Court precedent and the CWA. It would also likely not achieve the streamlining goal but could worsen regulatory burdens. Therefore, EPA should stick to its interpretation that consultation is not required.

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[28] 789 F.3d 1075 (9th Cir. 2015).

[29] 16 U.S.C. § 1538.

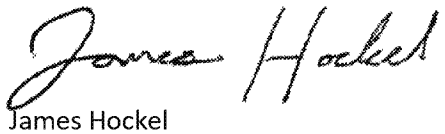
[30] *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)

[31] *See* 16 U.S.C. § 1535.

[32] *See* FWS, *Habitat Conservation Plans*, https://www.fws.gov/endangered/what-we-do/hcp-overview.html.

[33] *See* EPA, *Nationwide Permits Chronology and Related Materials under CWA 404*, https://www.epa.gov/cwa-404/nationwide-permits-chronology-and-related-materials-under-cwa-section-404.

Sincerely,



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